STATE OF MICHIGAN

COURT OF APPEALS

DALLIAS E. WILCOXON,

Plaintiff-Appellant,

v

MICHAEL A. CONWAY, BRENDA E. BRACEFUL, HORACE COTTON, CONWAY & MOSSNER, P.C. and DOZIER, TURNER & BRACEFUL, P.C.,

Defendants-Appellees.

UNPUBLISHED
September 19, 2006

No. 261135
Wayne Circuit Court
LC Nos. 01-125777-NM &
03-306761-NM

Before: Davis, P.J., and Murphy and Schuette, JJ.

PER CURIAM.

Plaintiff appeals various orders dismissing her claims against defendants, which claims sound in legal malpractice. Plaintiff's action is time-barred; therefore, we affirm.

Initially, we address defendant Conway's jurisdictional objection to this appeal. Conway contests jurisdiction, asserting that the February 8, 2005, order regarding defendant Braceful is not a final order because it was a dismissal "without prejudice" based on the failure of plaintiff to appear for trial.[1] Assuming that plaintiff is not entitled to an appeal as of right, in the interest of judicial economy and to end this protracted litigation, we shall assume jurisdiction, treating the appeal as an application or delayed application for leave and granting the application, and then proceed to consider the substantive issues. MCR 7.203(B); MCR 7.216(A)(7); *People v Harlan*, 258 Mich App 137, 144; 669 NW2d 872 (2003); *SNB Bank & Trust v Kensey*, 145 Mich App 765, 770; 378 NW2d 594 (1985); *Oakland Co Prosecutor v 46th Dist Judge*, 76 Mich App 318, 322; 256 NW2d 776 (1977).

The gravamen of plaintiff's complaint against defendants is for legal malpractice. Although plaintiff attempts to postulate her claims in the language of fraud and breach of contract, this Court has held that when a litigant "attempts to characterize a malpractice claim as

[1] The other defendants were previously granted summary disposition on the basis of the statute of limitations.

a fraud or other type of claim, a court will look through the labels placed on the claim and will make its determination on the basis of the substance and not the form." *Brownell v Garber,* 199 Mich App 519, 532-533; 503 NW2d 81 (1993). This Court has ruled that the essence of a claim is determined by reviewing the claim in its entirety and as a whole. *Aldred v O'Hara-Bruce,* 184 Mich App 488, 490; 458 NW2d 671 (1990). A claim against an attorney that alleges representation that failed to meet the requisite standard of care sounds in tort and not in contract. *Id.* Plaintiff's allegations comprise merely assertions of negligence. As such, they are actually claims for legal malpractice. This case is a legal malpractice action and nothing more, and it will solely be treated as such for purposes of our analysis.

Plaintiff's straightforward claims of legal malpractice are precluded by the statute of limitations. In general, a claim for legal malpractice must be brought within two years of the date the attorney discontinued providing representation or legal services to the client or within six months after the plaintiff discovers or should have discovered the existence of a claim, whichever is later. MCL 600.5805(6); MCL 600.5838; *Gebhardt v O'Rourke,* 444 Mich 535, 541; 510 NW2d 900 (1994). A lawyer is considered to have discontinued legal services to a client when he or she is relieved of the obligation by either the client or the court, or when the specific legal service the attorney was retained to perform has been completed. *Maddox v Burlingame,* 205 Mich App 446, 450; 517 NW2d 816 (1994). The retention of alternative counsel effectively serves to terminate the attorney-client relationship between the previous attorney and the client. *Id.*

There is no dispute that Conway ceased providing legal services to plaintiff upon the entry of an order effectuating his withdrawal as her counsel on June 9, 1995. Clearly, cessation of legal services by Conway in 1995 exceeds the two-year statute of limitations for legal malpractice, given plaintiff's filing of her complaint in July of 2001. Similarly, Braceful was permitted to withdraw as plaintiff's counsel on September 20, 1996. The termination of legal representation by Braceful on plaintiff's behalf occurred almost five years before plaintiff initiated the legal malpractice lawsuit. Cotton's representation of plaintiff terminated with the conclusion of the employment discrimination case and entry of summary disposition in favor of 3M on June 13, 1997. Cotton's representation of plaintiff concluded fully four years before plaintiff's legal malpractice action was initiated. It cannot be disputed that plaintiff, with respect to all defendants, failed to file her complaint within the two-year period after the accrual of her claim as required by MCL 600.5805(6).

Plaintiff's claims can only survive if the case was timely filed within the six-month discovery period permitted by MCL 600.5838(2), or if, the statute of limitations was tolled in accordance with MCL 600.5855 because of fraudulent concealment of the malpractice by the various defendants. Application of the discovery rule is precluded based on both the rendering of a final decision in her employment discrimination case in 1997 and the acknowledged receipt of her entire legal file from Cotton shortly thereafter.

Plaintiff's malpractice claim is effectively barred under the six-month discovery rule. The applicable standard, under MCL 600.5838(2), was set forth by the Michigan Supreme Court in *Solowy v Oakwood Hosp Corp,* 454 Mich 214, 221-223; 561 NW2d 843 (1997). The Court determined that, "[o]nce a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Id.*

Plaintiff's alleged injury arose from the unfavorable disposition of her employment discrimination case, which concluded in 1997. Given this fact, it must be determined whether plaintiff knew or should have known that the legal representation provided by the various defendants was a possible cause for her loss. Plaintiff's knowledge that Conway, Cotton, and Braceful failed to conduct discovery, alleged by plaintiff as necessary to support her employment discrimination claim, was known at the time of dismissal of the employment action, and even earlier when each attorney terminated their representation of plaintiff. Further, information that Conway did not initiate a worker's compensation action was discoverable by plaintiff in 1997 at the conclusion of the employment discrimination case, particularly given the availability of her entire legal file shortly thereafter. The same is true of the alleged failure of Cotton to file responsive pleadings to identified motions in the underlying action.

Plaintiff's suggestion that her legal file was too voluminous to permit her discovery of these omissions lacks merit. The discovery rule does not serve to place a matter in abeyance indefinitely while a litigant seeks professional assistance to determine the existence of a claim. Rather, a plaintiff is expected to act diligently in order to discover a possible cause of action and is not permitted to simply sit back and await others to reveal its existence. *Turner v Mercy Hosps & Health Services of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995). Plaintiff carries the burden of proof to demonstrate that she neither discovered nor should have discovered the claim more than six months before commencing the lawsuit for legal malpractice. MCL 600.5838(2). As such, plaintiff has failed to meet her burden. The dispositive facts in this case are not disputed and reasonable minds could not differ regarding the legal effect of the facts. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999).

Finally, plaintiff contends that the various defendants engaged in fraudulent concealment, resulting in a tolling of the statute of limitations. Pursuant to MCL 600.5855, the statute of limitations is tolled when a party conceals the fact that the plaintiff has a cause of action. *Phinney v Perlmutter*, 222 Mich App 513, 562-563; 564 NW2d 532 (1997). A plaintiff is required to plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment. *Sills v Oakland Gen Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996).

We cannot accept plaintiff's contention that Conway fraudulently concealed his failure to file a worker's compensation claim. Conway's representation of plaintiff terminated in 1995. Subsequently, plaintiff retained the services of three other attorneys. Plaintiff admits having access to her entire legal file as early as 1997, following dismissal of the employment discrimination case. Yet, plaintiff alleges that she did not discover the absence of a worker's compensation filing until 2001, after the conclusion of her attempt to appeal the action to the Michigan Supreme Court. Significantly, plaintiff fails to state with any particularity the acts engaged in by Conway to conceal this omission. Rather, plaintiff merely indicates that Conway asserted he would file a worker's compensation claim but failed to do so. Reversal is unwarranted.

Next, plaintiff alleges that Cotton fraudulently concealed his failure to file responsive pleadings. Based on Conway's termination of an attorney-client relationship with plaintiff following dismissal of the employment discrimination claim in 1997, there is no basis to support plaintiff's assertion she was unable to discover the alleged fraud until 2001, given her access to the entire legal file for the four-year interim period.

Plaintiff contends that Braceful concealed a possible settlement offer of $60,000 from her employer, which was purportedly not disclosed until a November 1, 2002, hearing. Despite providing a purported quotation of a verbal exchange with Braceful that appears to be solely based on plaintiff's alleged recollection, plaintiff provides no verification of either the exchange or the existence of an offer. Although plaintiff relies upon her own affidavit on appeal to substantiate this alleged verbal exchange, the affidavit put forth by plaintiff fails to even reference Braceful or her representation of plaintiff, and we deem it insufficient.[2] Again, reversal is unwarranted.

Under the circumstances presented, MCL 600.5855 simply does not form a basis to avoid the statute of limitations. In sum, the statute of limitations bars plaintiff's action with respect to all defendants.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Bill Schuette

[2] We also note that the action against Braceful was dismissed for failure to appear at trial and plaintiff does not frame an appellate argument or issue addressing any error related to the dismissal.